INDEX

SUBJECT INDEX

TABLE OF CASES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1947

No. 328

ADAMSTON FLAT GLASS COMPANY,
A CORPORATION, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF FOR PETITIONER.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The opinion of the Circuit Court in this case has been reported since the filing of petitioner's original brief in 162 F(2d) 875.

Petitioner believes there are certain statements made and points raised in respondent's brief in opposition to which a reply should be made, particularly

to call attention to the fact that respondent's brief emphasizes the need for a decision by this Court of the questions presented in the petition.

RESPONDENT'S STATEMENT OF FACTS

While petitioner does not believe that a detailed statement of facts is necessary for the Court's consideration of its petition for a writ of certiorari, petitioner wishes to clarify certain statements made by respondent in his statement of facts.

In the last paragraph starting on page 6 of respondent's brief it is stated that during April and May of 1926, Pittsburgh wrote letters to its counsel in which it was stated that if Sine and his associates could purchase the property at the foreclosure sale, that would be satisfactory since Pittsburgh did not care to acquire the property and would do so only to protect its interests. It is submitted that this statement does not clearly reflect the true status of the negotiations between the representitive of the Clarksburg interests and Pittsburgh conducted prior to the sale or the agreement reached by them prior to the sale. Consideration of all the correspondence between Pittsburgh and its attorneys (R. 35, 56, 57) and the negotiations between Sine and Pittsburgh as related in Sine's testimony (R. 86-92) indicate that Pittsburgh was at all times willing to cooperate in any way to permit the equity owners of the properties to retain said properties as long as its interests were protected, and that an agreement had been reached prior to the sale that this would be accomplished, it being left to the discretion of Pittsburgh's

attorneys whether it could be better accomplished by the Clarksburg interests paying the Pittsburgh indebtedness prior to the sale, bidding the property in at the sale, or letting Pittsburgh buy at the sale and then transfer to the new company formed by the Clarksburg interests. As noted by the Circuit Court in its opinion (R. 156), a plan of reorganization had been agreed upon prior to the sale, and the Tax Court found that the letter from Pittsburgh to its attorneys dated May 17 (R. 137), three days prior to the sale, was the substance of the agreement between Pittsburgh and Sine.

Statements made by respondent in the last paragraph starting on page 9 of its brief and in the footnote on page 10 would indicate that stockholders of Clarksburg acquired only 729 of the 1500 issued shares , or less than 50 per cent. of the stock of petitioner, and that petitioner claims the finding of the Tax Court to that effect is erroneous. Petitioner simply points out that it is apparent from a comparison of the list of stockholders of Clarksburg (R. 62-64) and the list of stockholders of Adamston (R. 67-68), both stipulated to be correct (Paragraph 5 of Stipulation, R. 22, and Paragraph 20, R. 25), that 12 stockholders of Clarksburg acquired 754 shares of Adamston, and that the list of stockholders appearing in paragraph 26 of the Tax Court's findings of fact (R. 143) is incomplete because it omits the names of A. F. Wagner and J. W. Stickley, who together acquired 25 shares of Adamston stock and whose names appear on both the list of Clarksburg stockholders and the list of Adamston stockholders as

stipulated. There is no evidence to the effect that they were not stockholders of both companies.

RESPONDENT'S ARGUMENT A

Respondent does not deny that there is a substantial federal question involved in this case, nor does he deny that the question presented in the petition is one which should be decided by this Court. He merely recites his interpretation of the statutory provision "immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them", urges that the holding of the Circuit Court on this point agrees with his interpretation and is correct, and then attempts to show that this decision is not in conflict with the decision of the Sixth Circuit Court in *Muskegon Motor Specialties Co.* v. *C. I. R.*, 134 F(2d) 904 (Cert. denied 320 U. S. 741, 88 L. Ed. 440).

The basis for respondent's argument that there is no conflict in the two decisions is that there was a peculiar factual situation in the *Muskegon* case that was different from the facts in this case. It is true that the facts in every case cited by both petitioner and respondent are somewhat different but it is difficult to visualize how the Sixth Circuit Court, in view of the language used in its opinion and the conclusion reached in the *Muskegon* case, could have reached the same conclusion the Fourth Circuit Court reached in this case, or how the Fourth Circuit Court could have agreed with the Sixth Circuit Court in the *Muskegon* case in view of its conclusion in this case.

Respondent states that the language of the Sixth Circuit Court in the *Muskegon* case "must be viewed in the light of the facts which show that the participating stockholders, collectively considered, had an interest of more than 50 per cent in the combined properties of the two transferor corporations" (Br. 16). That was true after the property was in the hands of the new corporation, and it is also true in this case. But did any of the stockholders of the new corporation in the *Muskegon* case have a 50 per cent interest in the Gordon properties prior to the transfer? The answer must be that they did not have as much interest in those properties before the transfer as the Adamston stockholders had in the Clarksburg properties prior to the transfer in this case.

Respondent points out (Br. 15) that the cost of the depreciable assets acquired from Muskegon Michigan was about $490,000 and the cost of those acquired from the Gordon Company was $364,000. If it is his contention that we must lump the properties of the two corporations prior to the transfer and determine that because 100 per cent. of the ownership of $490,000 worth of assets and 28 per cent. of the ownership of $364,000 in assets acquired stock in the new corporation, therefore, more than 50 per cent. of the ownership of the combined properties prior to the transfer was held by stockholders after the transfer, we need only point out that the unrecovered cost, which the commissioner there insisted should be used, of the Gordon properties was about $215,000 and of the Muskegon Michigan assets about $23,000 (See Appendix Petitioner's brief p. 55), so that even the

above contention would not be sound. It is submitted that there is no way of reconciling the two cases and that they are conflicting.

Petitioner believes the Commissioner's effort to rationalize the conflict in this case and the *Muskegon* case further emphasizes the need for a decision of the question raised in the petition by this Court. In the *Muskegon* case the Commissioner took the position that there was a sufficient continuity of interest to require use of the transferor's basis, despite the fact that less than 50 per cent. of one of the old companies was carried over into the new company. But there the unrecovered cost was much lower than the cost to petitioner. The Commissioner must take such conflicting positions when the law is uncertain. This uncertainty is mentioned by the Tax Court in *Montgomery Building Realty Co.* v. *C. I. R.*, 7 T. C. 417, wherein the Tax Court held that the Commissioner was wrong. This uncertainty should be resolved by this Court.

RESPONDENT'S ARGUMENT B

Respondent's second point of argument in his brief is that there was no reorganization in this case, a question not presented in the petition for a writ of certiorari nor in a cross petition, and not argued in petitioner's original brief. While petitioner will not discuss the right of respondent to raise this question in argument on the merits of the case, it does not believe this question has any place in a brief filed in connection with a petition for writ of certiorari which does not rely on that point. It is our understanding that an argument in this connection should

be restricted to the question whether the decision of the lower court presents a question which should be reviewed by this Court, and that such question must be properly raised by a petition.

The Circuit Court found that there was a reorganization and, if that decision was erroneous, this Court should be more inclined to grant certiorari than deny it as requested by respondent. Respondent's argument in this connection at this point in the proceedings merely indicates that he, too, believes the Circuit Court erred and is an additional reason for this Court to review the proceedings. If this point is to be considered here, petitioner refers this Court to the reasoning of the Circuit Court on this point as reflected in its opinion (R. 158-159).

CONCLUSION

It is respectfully submitted that there is a conflict in the decisions of the Circuit Courts on the question raised in this petition for writ of certiorari, that this question is a substantial question of federal law, which has not been, but should be, decided by this Court, and that this Court should grant a writ of certiorari in this case to bring the case before it for argument on the merits so that it may properly resolve the uncertainty in the interpretation of the law.

CHARLES W. MOXLEY,
Counsel for Petitioner.

William M. Drennen,
JACKSON, KELLY, MORRISON & MOXLEY,
Of Counsel.